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IN THE

Supreme Court of the United States

October Term, 1959

No. 257

DANIEL LESSA and NICHOLAS LESSA,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners, Daniel Lessa and Nicholas Lessa, pray that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered against them in the above entitled case on June 15th, 1959.

Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in the Appendix.

Jurisdiction

The judgments of the Court of Appeals were entered on June 15th, 1959. The jurisdiction of this court is invoked under Title 28, Section 1254(1), United States Code.

Questions Presented

I. Whether the Trial Court committed prejudicial and reversible error in

(a) refusing to allow the defense to introduce in evidence the minutes of the court-martial of the witness and co-conspirator, Ewing, for desertion in time of war and sodomy?

(b) refusing to allow the defense to introduce evidence tending to establish the falsity of Ewing's testimony that in 1957 and 1958, he was employed as a salesman for Linden Motors?

(c) allowing the witness and co-conspirator, Ewing, to "explain" an answer relative to his statement of March 18, 1956, resulting in the disclosure by him that one of the defendants, Behrman, "was in jail at that time"?

II. Whether the intemperate and inflammatory remarks of the prosecutor during his summation did not require the declaration of a mistrial?

III. Whether the Government established by substantial evidence beyond a reasonable doubt that there was one continuing conspiracy beginning on or about January 1, 1950, and ending on or about May 1, 1956?

IV. Whether in view of the nature of the offense (a narcotics conspiracy), and a mass trial of 19 defendants including the petitioners, on an indictment naming 46 defendants with conspiring among themselves, and with 16 other persons named as co-conspirators, did the petitioners

receive a fair trial and did they receive the procedural protection guaranteed by the Constitution?

Statutes Involved

Title 18, Section 371, United States Code, provides in pertinent part as follows:

> "Sec. 371. Conspiracy to commit offense or to defraud United States.
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.
>
> * * * * * *"

Title 18, Section 212, United States Code, provides in pertinent part as follows:

> "Sec. 212. Offer or threat to customs officer or employee.
>
> Whoever gives, offers, or promises any money or thing of value, directly or indirectly, to any officer or employee of the United States in consideration of or for any act or omission contrary to law in connection with or pertaining to the importation, * * * of merchandise * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both.
>
> Evidence, satisfactory to the court, of such giving, offering, or promising to give, or attempting

to influence or control, shall be prima facie evidence that the same was contrary to law."

Title 21, Section 173, United States Code, provides in pertinent part as follows:

> "Sec. 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.
>
> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; * * *."

Title 21, Section 174, United States Code, provides in pertinent part as follows:

> "Sec. 174. Same; penalty; evidence.
>
> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States * * * such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Statement of the Case

The Indictment

Petitioners were tried to a jury in the United States District Court for the Southern District of New York on a one count indictment charging 46 defendants with conspiring among themselves and with 16 other persons named

as co-conspirators but not as defendants, to violate Title 18, United States Code, Section 212 (relating to offer or threat to customs officer or employee), Title 21, United States Code, Section 173 (relating to the prohibition of the importation of narcotic drugs), and Title 21, United States Code, Section 174 (relating to the penalty for violation of Section 173), all in violation of the general conspiracy statute, Title 18, United States Code, Section 371.

Of the 46 original defendants, 2 pleaded guilty before trial; 13 were fugitives at the time of trial; at the opening of the trial, the motions of two defendants for a severance were granted and the Government moved to sever as against 12 others; the trial proceeded against the 19 remaining defendants.

The actual trial commenced on February 3, 1958, and continued until the return of the jury's verdict on March 25, 1958. Sentence was imposed on petitioners on April 25, 1958. Daniel Lessa received a sentence of five years. Nicholas Lessa received a sentence of four years.

The Record

The record in this case before the Court of Appeals for the Second Circuit was the certified typewritten record of the United States District Court for the Southern District of New York, the appellants' printed appendices consisting of 4 volumes, printed briefs on behalf of the various appellants, the Government's printed appendix, and the Government's printed brief. The printed appendices of the appellants are submitted with this petition.

The Facts

The Government offered testimony from many witnesses, approximately 20 in number, to prove the charge contained in the indictment that the 46 defendants named therein, and the 16 co-conspirators conspired with each other to import and distribute narcotics contrary to law.

The three principal Government witnesses were James Ewing, a co-conspirator, Jean Pierre Lafitte, a special employee (informer) employed by the Bureau of Narcotics, and Joseph Basile, a co-conspirator. James Ewing was the only witness against petitioners.

For many trial days Government witnesses testified about the activities of various defendants, beginning about January 1, 1950, and ending about May 1, 1956. Many names and places were given. Numerous events were described. The importation, sale and distribution of narcotics were referred to again and again. In this setting, Ewing's testimony concerning the petitioners, in a transcribed record of nearly 6000 typewritten pages, takes up nine pages and is found at Pages 578a to 587a.* This is the entire evidence of the Government against the petitioners. There, in a series of leading and suggestive questions requiring objections which availed the petitioners nothing, because the harm had already been done, the witness and co-conspirator testified in brief, that on a number of occasions between April and November, 1955, he accompanied Vellucci, another co-conspirator, to a restaurant and bar located at 117th Street and Pleasant Avenue, in New York City; where the petitioners singly and together, gave Vellucci orders for drugs and that he sometimes saw money paid therefor.

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* Page numbers refer to printed Appendix.

There is no other testimony or proof which in any way served to involve the petitioners in the conspiracy alleged in the indictment. And, the Trial Court charged the jury that this was so and that if it disbelieved Ewing's testimony, it was required to render a not guilty verdict as to petitioners.

Reasons for Granting the Writ

Nineteen defendants including petitioners were tried together on this narcotics conspiracy indictment. At the end of the Government's case the Trial Judge granted a judgment of acquittal in favor of one defendant. The jury convicted the other 18. Appeals were taken by 17 of the convicted defendants, including petitioners. One defendant received a suspended sentence and did not appeal. Another defendant died before his appeal was heard. The Government confessed error on the appeal of a third defendant. Of the 15 defendants whose appeals were heard and considered by the Court of Appeals, there was a reversal as to 3 (the customs agents). The judgments of conviction of the other 12 defendants were affirmed.

It was respectfully requested by the various appellants that the Court of Appeals consider any and all arguments and points on appeal made by any other appellant which might be applicable to their contentions, not made by them in their briefs. The same request is made of this Court in the hope of saving the time of the Court.

By arrangement between the Trial Court and counsel for both sides, the objections of one defendant inured to the benefit of all the others (108a).

I. (a) This witness, James Ewing, named in the indictment as a co-conspirator but not as a defendant, was the government employed nurse-maid looking after the wants and needs of the "darling of the prosecutor's nursery", this chain conspiracy indictment, which accused petitioners with so many others and brought them to this mass trial.

He was a convicted deserter from the Navy in time of war. He was a convicted sodomist, having been caught *in flagrante delicto* by a superior officer. Both convictions were before a Navy court-martial.

It had been demonstrated and it was later again and again demonstrated, that as to many serious and important matters, Ewing had little regard for the truth. For example, it was Ewing's testimony at the trial that he had seen the defendant, Behrman, about a dozen times before the arrest of the defendant, Gelb, on March 5, 1954 (474a-476a). That he had met Behrman on dozens of occasions (475a-476a). That there were at least eight different specific occasions when he met with Behrman and narcotics was discussed by him and others in Behrman's presence (464a-466a, 468a-470a, 480a-481a, 482a-484a, 486a-492a, 507a-508a, 514a-516a, 519a-522a, 526a-527a, 536a-539a, 544a-547a, 554a-555a, 556a-559a, 570a-573a, 615a-619a). That ninety per cent of the times when he saw Behrman, the discussion was about narcotics and they talked about it with each other (774a). That there were fourteen specific occasions to which he was able to testify that Behrman and Velucci discussed narcotics in his presence (460a-461a, 480a-481a, 486a-491a, 507a-508a, 525a-527a, 536a-539a, 534a-547a, 554a-555a, 556a-558a, 558a-559a, 600a-604a, 617a, 618a-621a, 622a-624).

Contrast this with his testimony before a Grand Jury in Detroit regarding the defendant, Behrman.

First, he said that he saw very little of Behrman—all in all, about four or five times (775a); *second*, he testified that there was only one occasion that Behrman and Vellucci discussed narcotics in his presence, which was the day that Behrman was supposed to be going to Chicago concerning some heroin (863a-865a).

There can be no valid contention made that the questions put to Ewing about Behrman did not ask for all that Ewing knew in this respect. Nor can it be properly maintained that Ewing was not desirous of implicating Behrman, since what little he was about to tell the Grand Jury in Detroit, did serve to implicate him. And neither can it be seriously argued that Ewing didn't remember the extent of his knowledge of Behrman's narcotic activities in 1957 before the Detroit Grand Jury. Clearly the knowledge that Ewing purported to have, if his testimony at the trial is any criterion, was of too detailed a nature and too dramatic, to warrant any such argument. Obviously, Ewing lied on this score at the trial.

Turning now to Ewing's testimony regarding Baruche. First, he testified that Vellucci spoke of Baruche practically every day (786a); second, that Vellucci had on several occasions told him that Baruche was the organization's representative in France (492a, 615a, 784a-786a); third, that there were other conversations in which Baruche was mentioned in Ewing's presence (786a-787a, 796a-798a) and last, Ewing referred to Baruche on at least eight different occasions during his direct examination (492a, 615a-624a). And it will be noted that all of Ewing's specific testimony about Baruche related to the latter's alleged connection with Vellucci and Behrman in the narcotic traffic.

But before the Grand Jury in Detroit, Ewing testifying as to his knowledge of the organization's overseas contact and especially as to Baruche, stated that Vellucci had never told him that Baruche was the organization's overseas contact for Baruche's business; that he met Baruche only a couple of times and Vellucci told Ewing that Baruche was a friend; that Ewing only learned about Baruche after the government investigation started and he was shown a picture of Baruche (800a-801a).

The only bit of testimony that is consistent is that relating to driving Baruche to a French restaurant. As to the remainder, it is plain that Ewing was lying either before the Detroit Grand Jury or at the trial.

And equally illustrative of Ewing's propensity for falsification is his testimony on cross-examination by petitioners' counsel (842a-859a). There he testified that he was a customer of Vellucci's and also his chauffeur. He denied that he had ever testified that Vellucci paid him $200.00 per week as a chauffeur, although when confronted with his New York Southern District Grand Jury testimony, he had to admit he had so testified. He denied he acted as a sort of companion for Vellucci because Vellucci was afraid to travel alone, although, once again he had to admit he had so testified before the New York Southern District Grand Jury.

Like so many witnesses, Ewing sailed along blithely on his direct examination but came a cropper on cross-examination, when he tried hard to reconcile the glaring inconsistencies between his testimony before the grand juries in Detroit and New York City and his sworn statements to the police and narcotic agents, with his trial testimony.

The foregoing examples of Ewing's lies indicate plainly that it must have been a very close case for jury determination and a real border-line issue for the jury to decide that Ewing's testimony (and his was the sole testimony implicating the petitioners) met the standard required for the guilty verdict returned.

Had the Court permitted the defense to show by an impeachable evidence (the minutes of his Navy court-martial) that Ewing was an out and out liar, the result might well have been different, at least as to these petitioners against whom the Government's case was so meager. This was error.

In such case the jury might well have concluded to reject all the material portions of Ewing's testimony implicating the petitioners and others similarly situated, for this witness on cross-examination by the defendant Stromberg's counsel, testified in the following manner.

While defendant Stromberg's counsel was reading Exhibit G-1, Ewing denied that he was convicted of the specifications relating to the charge of scandalous conduct (640a-641a). Ewing then admitted that he was convicted but denied his guilt and said he had only a five-minute trial (641a-642a). Although he then admitted that he requested counsel, he stated unequivocally that no witnesses appeared against him (642a). He then changed that testimony and said that he did not remember that any witnesses appeared against him (643a). However, he took that back and changed his story to say that there were no witnesses during his court-martial (643a). He then said he did not remember any witnesses and did not think there were any (644a). At that point the defense offered the remainder

of the court-martial proceedings in evidence to establish that there were witnesses. The prosecution's objection to this offer was impliedly sustained (644a). Ewing then stated—and it was left at this—that he did not remember whether any witnesses testified against him (645a). The prosecution's objection to the subsequent offer of the remainder of the court-martial minutes was unequivocally sustained (646a).

Here is what this extraordinary performance comes down to.

Nothing could be clearer than that Ewing must have remembered whether witnesses appeared against him at this court-martial. He stated on three different occasions that none did appear against him, and on three other occasions he stated that he could not remember. The jury could well believe his statement that none did appear against him on the theory that he must have remembered the circumstances of that court-martial. It might also have believed that it was unfair of the defense to suggest that witnesses did appear against him by asking the question. The defense, of course, had incontrovertible proof that there were witnesses against him, and the lie could have been exposed in a matter of seconds. There was no question of a lengthy inquiry into a "collateral" issue. Moreover, it was the prosecutor who brought out the fact of Ewing's court-martial in 1946 and put in issue the circumstances of that court-martial—for obviously the prosecution did not bring out the court-martial to impeach Ewing's credibility.

Yet, despite all this Ewing was permitted to imply that he was convicted at the court-martial without any evidence

against him—and this, of course, supported his claim that he was innocent of the charge.

If Ewing in fact committed the act referred to in the scandalous conduct charge, it would have shown him to be a person of the lowest moral character and hence totally unworthy of belief. But since Ewing was allowed to support his claim of innocence with the suggestion that there were no witnesses against him, the jury may have given him the benefit of the doubt and discredited the suggestion that he did in fact commit that act. In such circumstances the defense should have been permitted to nail the lie.

In *United States* v. *Tomaiolo*, 249 F. 2d 683, 692, the Court of Appeals of this Circuit said:

> "On cross-examination the Government was permitted to bring out, over objection, that he was twice sentenced to six months for being A.W.O.L. and that he twice suffered loss of pay for the same offense. The Government contends that the direct examination opened the door for an exploration of the witness' Army record on the issue of his credibility.'
>
> 'This line of cross-examination was not relevant to what the witness had stated about his Army service and his honorable discharge for it was not inconsistent with anything either stated or implied. Nor is such a breach of military discipline either a felony or a crime involving moral turpitude; see *Henderson* v. *United States*, *supra* (202 F. 2d 400, 405), and these are the only type of offense which may be used for general attacks on credibility.
>
> 'It was therefore error to allow the cross-examination concerning the court martial convictions."

In the instant case, Ewing had insisted that he had not been court-martialed as a deserter in time of war but only for being A.W.O.L. (453a, 632a), although it was developed that his absence was for a period of 547 days, one and a half years approximately (639a; Defendant's Exhibit G-1). Further, Ewing, denominated the scandalous conduct charge at the court-martial as "fighting" (636a-637a) and it turned out to be sodomy.

If our Court of Appeals in the *Tomaiolo* case took the pains to distinguish between offenses involving military discipline like being A.W.O.L. and offenses constituting moral turpitude, and it cannot be gainsaid that desertion for approximately a year and a half in time of war and the indecent conduct involved, are examples of crimes involving moral turpitude than which there can be a few greater, then should not the jury have been permitted to learn in a certain and definite manner, that Ewing's court-martial was not merely for breaches of military discipline but for serious crimes which are both high grade felonies under federal and state law.

(b) Again as to Ewing's alleged employment as a salesman selling automobiles for Linden Motors in Jamaica, Long Island (783a-784a). He testified that he had commenced his employment there in May of 1957 and that he had been so employed until a short time before the trial, on a commission basis.

The prosecution asked Ewing the nature of his present occupation, and he answered "salesman". Since the prosecution had brought out this "fact" with its suggestion that Ewing had finally settled down to leading a straight life, the defense was of course duty bound to inquire further into

the facts. It did so and elicited testimony that Ewing sold cars and worked for a place supposedly called Linden Motors in Jamaica, Long Island (783a). He said he started working there, on a commission basis, in May of 1957 (783a-784a).

The defense was prepared to prove that there was no such place as Linden Motors and that the only places even remotely resembling that name never employed Ewing as a salesman or on any other basis.

Entirely apart from demonstrating that Ewing had lied about this matter, this evidence would have torn away the cloak of respectability which the prosecution sought to place over him. The defense was entitled to answer the "irrelevancy" elicited by the prosecution with the truth. See 1 Wigmore, § 15 (3d ed.) pp. 305-09; *Crawford v. United States*, 198 F. 2d 976, 978-79 (D. C. Cir. 1952) (hearsay admitted to rebut hearsay brought out by other side); *California Insurance Co. v. Allen*, 235 F. 2d 178 (5th Cir. 1956) (defendant allowed to introduce result of lie detector test after plaintiff testified he had volunteered to take one).

The nature of the lies hereinabove recited might have been the very thing that would have convinced the jury that none of Ewing's testimony was believable. Considering that his was the only prosecution testimony relative to the petitioners and since the whole case against them turned on close and disputed issues of fact, it is submitted that it was prejudicial and reversible error not to have permitted the defense to introduce the evidence referred to above. Particularly is this so in a mass conspiracy trial such as existed here, where the courts must be even more

careful than they usually are to insure a just result (See *Kotteakos* v. *United States*, 328 U. S. 750, 773):

(c) The Trial Court committed error in permitting and even insisting that Ewing be given an opportunity to explain his answer to counsel's question on cross-examination as to the statement of March 18, 1956, and refusing to declare a mistrial.

Ewing had not mentioned the name of the defendant, Behrman, in a six page statement he had made and sworn to on March 18, 1956, before police and narcotics agents in Detroit. Counsel asked him whether he mentioned Behrman's name, and to answer "yes or no". Ewing said he couldn't answer without an explanation. Counsel stated he wanted no explanation. Over counsel's objection the Court permitted Ewing to answer "yes or no and explain". Ewing answered: "No, I didn't mention his name in there because at that time I was not dealing with Nathan Behrman. At that time Nathan was in jail".

Counsel immediately moved for a mistrial which was denied by the Trial Court, which instructed the jury to disregard the remark that Behrman was in jail.

The answer of the witness was over the repeated objection of defense counsel (770a-771a). When the answer came forth as it did after the Court's instruction to the witness not merely allowing him to explain but actually ordering him to do so (The Court: You will answer yes or no and explain.), a motion for a mistrial was made and overruled (771a).

The Court's instructions to disregard the remark which it repeated (771a) served only to accentuate the harm and error.

The Court of Appeals in its opinion stated that the testimony was inadmissible; and that to Behrman at least, it was also prejudicial. The Court, however, went on to say that the answer was unforeseeable and plainly had not been induced by the prosecution. Further, the Trial Court had instructed the jury to pay no attention to the remark in any way. And finally, the Court stated that "the incident was an isolated one during the course of a long trial".

Petitioner respectfully urges that it is immaterial whether the answer was induced by the prosecution or by the Trial Court; it certainly was not induced by defense counsel. It was clearly inadmissible, and it was prejudicial not only to Behrman but to every defendant on trial including petitioners. In a mass narcotic conspiracy trial its prejudicial effect was incalculable, certainly of the greatest weight and bore heavily and prejudicially on every defendant being tried. The fact that this was one isolated incident of its kind during a long trial, does not minimize the prejudice it caused. Because this was a long trial, a mass conspiracy trial, where the issues were closely drawn, where credibility was in the balance, one such prejudicial remark could and probably did tilt the scales and sway the jury. That alone is sufficient ground for reversal. The Court of Appeals should have followed *United States* v. *Tomaiolo*, 2 Cir., 249 F. 2d 683.

See, also, *United States* v. *James*, 208 F. 2d 124; *United States* v. *Modern Reed & Rattan Co., Inc.*, 2 Cir., 159 F. 2d 656.

Other than the testimony of Ewing, there was no evidence to connect the petitioners with the conspiracy charged in the indictment. True it is that the Court instructed the

jury that if it disbelieved Ewing, it was required to acquit them, but by permitting, no, even requiring the explanation to be given over objections by counsel, it committed reversible error and the statement to the jury, although repeated, to disregard the prejudicial statement, was inadequate to cure the error.

To allow Ewing's sketchy testimony against the petitioners, to become the fulcrum for raising the Government's extraordinarily thin case to the point where the jury would have to consider and evaluate it against their innocence or guilt required concomitantly allowing the jury to consider

> 1. The full transcript of Ewing's court-martial for desertion in time of war and sodomy at which he was caught *in flagrante delicto.*
>
> 2. The proffered testimony of the representative of the Bureau of Motor Vehicles to show that there was no Linden Motors, where Ewing said he was employed as a used car salesman.

and to consider these matters with minds unprejudiced by Ewing's "explanation" which brought out the prior arrest and conviction of Behrman.

Despite the fact that Ewing's statement about Behrman being in jail had of necessity reference to this defendant only, the motion for a mistrial applied to all defendants (770a-771a). Further in *Tomaiolo, supra*, the Court held (p. 696):

> "Where errors as to one defendant are so substantial and of such nature as to affect a co-defendant with whom he is tried jointly, appellate courts have reversed the convictions of both defendants on trial where it seemed that they could not have been fairly

tried. *United States* v. *Thomson*, 7 Cir., 1940, 113 F. 2d 643, 129 A. L. R. 1291; *Feder* v. *United States*, 2 Cir., 1919, 257 F. 694, 5 A. L. R. 370; *Smith* v. *United States*, 6 Cir., 1956, 230 F. 2d 935; *Nelson* v. *United States*, 1953, 93 U. S. App. D. C. 14, 208 F. 2d 505; *Duncan* v. *United States*, 7 Cir., 1928, 23 F. 3."

Consequently, this error was sufficiently grievous and prejudicial to affect the rights of the petitioners and require a new trial as to them.

II. During his summation to the jury, the prosecutor pulled out all the stops. Some of his remarks, it will be claimed, were provoked by one or more of defense counsel. But the following statements were inflammatory, calculated to improperly excite the jury's passions and influence its deliberations and should not have been indulged in.

> "* * * and you will believe it as I believed it, because, if I didn't believe it, I wouldn't put them on the stand" (1541a).
>
> "Indeed, I say, if one witness for the Government testified falsely from that stand, I would withdraw from this case" (1541a).
>
> "Have we sunk so low that the Attorney General would send a special assistant from Washington to make a conspiracy case against innocent men? If we have sunk that low, if you think so, then we might as well turn this country over to the Russians" (1544a).

The last excerpt, aside from implying the prosecutor's belief in the purity of the motives of all those on the Government side, was probably of the most inflammatory nature, and a mistrial should have been granted then on request of defense counsel.

The dissenting opinion in *Henderson* v. *United States*, 6 Cir., 218 F. 2d 14, is cited with approval in this court's recent decision in *United States* v. *Spangelet*, 258 F. 2d 338, where it was said: ——

> "It is well settled that the jury's consideration in a case should be limited to those matters actually brought out in evidence and that summation should not be used to put before the jury facts not actually presented in evidence. This doctrine is especially important in criminal trials. The prosecutor represents 'a sovereignty whose obligations is to govern impartially'. *Berger* v. *United States*, 295 U. S. 78, 88. As *Berger* suggests, this obligation may cause a jury to place more confidence in the word of a United States Attorney than in that of an ordinary member of the Bar. *And it is especially inadmissible for the prosecutor to put into issue his own professional integrity, as was done here.* (Emphasis supplied)

Here the United States Attorney for the District repeatedly placed his own personal and professional integrity before the jury as a guarantee that the prosecution was properly initiated by the Attorney General in Washington, his local office in this District and that it was being conducted by the giving of testimony by witnesses for whom he was ready to personally vouch.

This was improper and not in keeping with our traditions of fair play and justice.

Further the prosecutor unfairly made comment on the failure of some of the defendants to testify in their defense (1546a). In arguing that even witnesses for the defense had corroborated the witnesses for the Government, he stated to the jury, "even Brisbois, who had the courage to

take the stand, corroborated, etc." (1546a). The clear implication of this remark was that those defendants who did not take the stand were not courageous and, hence, that there might have been something for them to fear if they took the stand. This was, of course, an impermissible comment on the failure of the accused to testify and, in the circumstances, was not, we submit, cured by the court's charge. The Court of Appeals in its opinion held this comment to constitute error, but not so prejudicial as to require a new trial. Petitioners respectfully submit that this comment was very prejudicial to both of them since they did not take the stand, and the charge of the Trial Court did not and could not cure the error.

The prosecutor suggested to the jury, both expressly and by implication, that Government witnesses were in grave danger and testifying against defendants at their peril.

He asked the rhetorical question, "And why do you think we have Ewing over in the St. George Hotel under a guard of two Treasury agents?" (1570a). This remark was in line with earlier attempts by the prosecution to suggest the alleged peril to which its witnesses subjected themselves (300a). For example, the prosecutor told the witness Ewing that he did not need to be afraid to give his address (473a). And earlier, the prosecutor asked Lafitte whether he was not subjected to danger in working for the Government (174a, 300a). These remarks and questions constituted a patent attempt to play upon the sympathy of the jury and make it reluctant to return a verdict rejecting the testimony of these brave men who were risking their very lives to testify for the prosecution. More than that, they suggested that someone was prepared to do violence to these witnesses and it would have been natural for the jury to infer

that that someone was an agent of one or more of the defendants, if not the defendants themselves.

III. & IV. With regard to whether the Government established by substantial evidence beyond a reasonable doubt that there was one continuing conspiracy beginning on or about January 1, 1950 and ending on or about May 1, 1956, and whether in view of the nature of the offense (a narcotics conspiracy) and a mass trial of 19 defendants including the petitioners on an indictment naming 46 defendants with conspiring among themselves and with 16 other persons named as co-conspirators, the petitioners received a fair trial and the procedural protection guaranteed by the Constitution, petitioners refer this Court to the arguments advanced by the petitioner, Steve Puco, in his petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the same case on June 15, 1959. This it is believed will serve to lighten the Court's burden and these contentions are found on pp. 9 through 13 of the Puco petition.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 214—October Term, 1958.

(Argued February 4, 1959 Decided June 15, 1959.)

Docket No. 25188.

UNITED STATES OF AMERICA,

Appellee,

—v.—

HARRY STROMBERG, HENRY TEITELBAUM, JEAN ARON, NATHAN BEHRMAN, MARTIN DE SAVERIO, GEORGE BRISBOIS, HERMAN SAMNICK, BENJAMIN DANIS, SAUL SNYDER, SALVATORE MAIMONE, ANTHONY MIRRA, STEVE PUCO, DANIEL LESSA, NICHOLAS LESSA and LEO SETO,

Defendants-Appellants.

Before:

SWAN, *Circuit Judge,*

MADDEN, *Judge,* United States Court of Claims,*
and HINCKS, *Circuit Judge.*

Appeals from the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge.*

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* Sitting by designation pursuant to the provisions of 28 U. S. C. §291(a).

SAMUEL MEZANSKY, New York, N. Y. (Moses Polakoff and Sheldon Lowe, New York, N. Y., on the brief), *for defendant-appellant Harry Stromberg.*

DANIEL H. GREENBERG, New York, N. Y. (Max Fruchtman, New York, N. Y., on the brief), *for defendant-appellant Henry Teitelbaum.*

JOSEPH LEARY DELANEY, New York, N. Y., *for defendants-appellants Jean Aron and Anthony Mirra.*

MAURICE EDELBAUM, New York, N. Y. (Chester E. Kleinberg, New York, N. Y., on the brief), *for defendant-appellant Nathan Behrman.*

FREDERICK B. BOYDEN, New York, N. Y., *for defendant-appellant Martin De Saverio.*

GEORGE FEIT, New York, N. Y., *for defendant-appellant George Brisbois.*

IRWIN KLEIN, New York, N. Y. (Albert H. Ruppar, New York, N. Y., on the brief), *for defendant-appellant Herman Samnick.*

HENRY K. CHAPMAN, New York, N. Y. (Murray E. Gottesman, New York, N. Y., on the brief), *for defendant-appellant Benjamin Danis.*

EDWARD H. LEVINE, New York, N. Y. (Vernon C. Rossner, New York, N. Y., on the brief), *for defendant-appellant Saul Snyder.*

Appendix

MOSES L. KOVE, New York, N. Y., *for defendant-appellant Salvatore Maimone.*

JAMES J. HANRAHAN, New York, N. Y., *for defendant-appellant Steve Puco.*

HENRY K. CHAPMAN, New York, N. Y., *for defendants-appellants Daniel and Nicholas Lessa.*

MOSES POLAKOFF, New York, N. Y. (Samuel Mezansky, New York, N. Y., on the brief), *for defendant-appellant Leo Seto.*

GEORGE I. GORDON and MARK F. HUGHES, JR., Asst. U. S. Attys., Southern District of New York, New York, N. Y. (Arthur H. Christy, U. S. Atty., Herbert F. Roth, Kevin Thomas Duffy, Otis Pratt Pearsall, Alan W. Richenaker, and Gideon Cashman, Asst. U. S. Attys., S. D. N. Y., New York, N. Y., on the brief), *for the United States.*

HINCKS, *Circuit Judge*:

Fifteen defendants in this case appeal from judgments of convictions entered against them upon a jury verdict. The indictment, in a single count, charged forty-six defendants and sixteen others under 18 U. S. C. § 371 with conspiring to violate 18 U. S. C. § 212 (bribery of customs officials), 21 U. S. C. §§ 173, 174 (narcotics laws) and to

defraud the United States of its right to have the Customs Service administered free from corruption.

Before the trial, two defendants entered guilty pleas. The Government consented to the motions of three defendants for severance and itself moved for severance as to eleven more. Another eleven are fugitives from justice or unidentified. The remaining nineteen were tried together, although a number of them made timely motions for separate trial. The opinion of Judge Palmieri, 22 F. R. D. 513, deals in part with the severance motions, as well as with other pretrial motions. At the end of the Government's case, a judgment of acquittal was directed by the court in favor of one defendant. The jury returned verdicts of guilty against the other eighteen, and fifteen are now before us on appeal.[1]

At the trial, the Government's case depended principally upon the testimony of three witnesses. The first of these, one Lafitte, a Government employee and informer, testified to conversations with a number of the alleged conspirators during the first part of the conspiracy; the whole conspiracy, the indictment charged, continued from 1950 to 1956. In July, 1952, Lafitte met one Aron,[2] who ran several corporations and maintained offices in New York City. Through Aron, Lafitte met a number of the defendants named in the indictment: Gelb,[3] LaBonte,[3] Baruche,[3] and

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[1] One defendant, who received a suspended sentence, did not appeal; another died before his appeal could be heard; and on the appeal of a third, the Government confessed error.

[2] A defendant-appellant.

[3] A defendant, not on trial below.

Brisbois[2] whom Aron described as his Canadian representative. This group met frequently at lunch, dinners and at Aron's office; their conversations, according to Lafitte, frequently involved the narcotics trade. In one of these conversations, Gelb told Baruche he was paying too much for heroin in France. There was also discussion of a transaction "with the Boston people" in which $80,000 had been lost; it was generally agreed that a trip to Boston was necessary because the Boston people "would have to be straightened out." Also, the purchase of a coalyard in Boston was under consideration, through which narcotics might be smuggled. Finally, in November, 1952, Aron and Lafitte went to Boston with two others, not accused in the indictment: Gelb did not go because too closely identified with traffic in narcotics. In Boston, they met Brisbois, Moffie,[3] and Bucelli[4] and there was general discussion relating to the smuggling of narcotics. It appeared from the conversations that narcotics had already been smuggled through a Boston coalyard. The success of these further negotiations with the Boston group does not appear in the testimony. Shortly thereafter, however, Aron and Lafitte returned to New York. There the social contacts between Lafitte and Baruche, Gelb and Aron continued. Upon one occasion, Lafitte met Behrman,[2] whose name figues largely in the alleged conspiracy in its later stages. He also testified that he met Samnick[2] and Danis,[2] Customs Inspectors, upon various occasions, in the company of Aron, Gelb and Baruche; and each made a remark about the ease of smuggling goods through Customs. Aron

[4] A defendant who died pending his appeal.

described Samnick to Lafitte as "one of his Customs men." And the active assistance of Customs Inspectors was used as a talking point by Baruche in attempting to persuade Lafitte to join them in the narcotics business. Lafitte chose to remain unpersuaded, however; and, after he had reported his findings to the Government, some time early in 1953, it was apparently thought advisable to let his contact with the Aron group lapse.

Several aspects of Lafitte's testimony were corroborated by minor witnesses not named as defendants. Montfiore testified of dealings with Aron frequently after 1949, at the time when Aron was engaged in importing resistors for television tubes; that in Aron's office, he frequently saw Gelb, Baruche, Danis and Samnick; and that Aron told him that the Customs Inspectors were useful to him in avoiding red tape in getting in resistors by air. He testified further that although Aron said, once, that he owed Samnick and Danis money, he never saw any money passed; but did once see a postdated check, which Aron said was for Samnick. Also that Aron had in 1952 or 1953 described a transaction between Gelb and Baruche in which "Gelb had taken $30,000 from Baruche," Aron remarking that he was "very glad he was out of it."

One Adatto, a nephew of Baruche's who worked for Aron, corroborated that fact that Samnick and Danis were often in Aron's office; he testified that he once sought Samnick's help to expedite te entry of some electronic material for Aron and that he once took part in transferring funds from Gelb and Aron to Baruche in Europe through several Swiss bank accounts.

Finally, one Brenner, Aron's secretary, testified to frequent visits at Aron's office by Gelb, Baruche, Sammick and Danis.

After the period covered by Lafitte's testimony, which described events up to the end of 1952, evidence of the conspiracy breaks off until the end of 1953, when James Ewing, the second major prosecution witness, appeared on the scene. Ewing, himself a dealer in narcotics in Detroit, began to buy narcotics in New York from Vellucci,[5] delivered to him by Tedesco.[5] In answer to a complaint that the narcotics supplied were overly diluted, Vellucci said, according to Ewing, that he was going to deal with the "mob around 50th and Broadway." Aron's office, at this time was at 49th St. Somewhat later, Ewing testified, Vellucci began to purchase from Behrman and Gelb, to whom Ewing was introduced. He testified to one purchase in which the money he paid Vellucci was passed directly on to Gelb.

In March, 1954, Gelb was arrested by Federal Narcotics Agents. Government agents testified to the discovery of huge amounts of narcotics in two apartments used by Gelb where there was also discovered a letter from Baruche to Gelb. And the landlord at one of the apartments testified that Behrman was a frequent caller. According to one witness, Behrman was also seen at Federal Detention Headquarters talking to Gelb, after Gelb's arrest; and there was evidence that a letter was passed, by another witness, from Behrman to Baruche.

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[5] A named coconspirator, not a defendant.

The arrest of Gelb and the seizure of the huge cache of narcotics, Ewing testified, made it necessary for Vellucci and Behrman to raise from another source at least $50,000 to pay for a shipment of narcotics shortly to arrive from France. Ewing testified that to meet this need they obtained the aid of Stromberg,[2] who advanced them money; that later repayments were made on several occasions, varying in amount from $10,000 to $25,000; that present at these meetings was Teitelbaum,[3] who was a constant companion of Stromberg; that the money obtained from Stromberg was delivered to "Gene's [Baruche's] partner's house"; that he, Ewing, accompanied the deliverer to 39 E. 78th Street, a building in which Aron's apartment was also located, and that after the shipment of narcotics arrived Stromberg was paid off, in installments. According to Ewing, Stromberg continued to finance the imports and once agreed to take steps to settle a jurisdictional dispute with another distribution ring; on one occasion in Ewing's presence money was paid by Vellucci to Teitelbaum for delivery to Stromberg; and after consultation with Stromberg and Vellucci, Behrman made the arrangements with Baruche, the European supplier, passing on to him complaints about the quality of narcotics, and, on one occasion, going to Europe himself.

Ewing testified that Vellucci told him, "We have Customs men paid off," and that Vellucci handled the distribution in New York. In the summer of 1954, Ewing's relationship with Vellucci became closer; while carrying on the distribution of narcotics in Detroit, through agents, he nonetheless managed to spend a great deal of time in New York. He began driving for Vellucci and was present at a number of

meetings with retailers, including De Saverio,[2] the Lessa brothers,[2] Puco,[2] Seto,[2] and Di Palermo,[3] at which orders were placed and cash, for earlier deliveries, was received. In June or July of 1955, Ewing met Baruche, who had come to the United States in answer to complaints that one shipment of heroin was bad. When the shipment was tested and found bad, in the presence of Vellucci and Behrman, Baruche agreed to bear the expense of replacement.[6] In August of 1955, Ewing was summoned to New York from Detroit by Vellucci; they drove to Hoboken, where they met a Customs Inspector, identified by Ewing as Snyder,[2] who delivered to them two suitcases. Vellucci told Ewing that the suitcases contained heroin; and shortly thereafter, Ewing was paid off for his help, in heroin.

Several aspects of Ewing's story were corroborated by other witnesses. Hart, a woman living with Ewing during the period, testified that she had received a number of deliveries of heroin from Tedesco, Vellucci's agent. And both she and Frank, a Detroit police officer in Ewing's pay, corroborated Ewing's account of a trip to New York and a meeting with Vellucci during which Vellucci showed Ewing how to test cocaine.

The last principal Government witness was one Basile, a narcotics retailer. His testimony related mainly to his source of supply, Di Palermo, whose business was operated in a candystore at 46 Prince Street. A Narcotics Agent testified that he had followed Vellucci and Behrman, in October, 1955, to the same address. Basile testified that he

[6] It was shown that Baruche was registered at a New York hotel from July 22-29, 1955.

and his partners, Yacono[3] and Maimone,[2] had been supplied with both cocaine and heroin by Di Palermo; that one Greenberg[3] offered to introduce him to Behrman, who would sell him heroin for $7,500 a kilo, which was less than he was then paying Di Palermo; that when apprised of this competition, Di Palermo agreed to sell to him, Basile, for $7,000 a kilo, if Basile would buy in quantity, admitting that Behrman was his source. According to Basile this course of dealing continued without incident, except when a delivery of narcotics at about the beginning of September proved to be inferior. Di Palermo then told him "it's Natie Behrman's goods, it's got to be o.k." Somewhat later, Basile talked to Behrman and Vellucci, who said they had "got hit with a bad batch." On one occasion, Basile saw Di Palermo turn over money to Vellucci. Basile also implicated Mirra[2] and Paradise,[3] who regularly bought narcotics from him.

Upon this evidence, the Government maintains that a single conspiracy, as charged in the indictment, was properly found by the jury and that the convictions must be upheld. More specifically, it urges that Aron and Baruche, operating behind the facade of a legitimate importing business, were the central figures in a syndicate engaged in importing narcotics into this country. The Government maintains that Baruche served as the purchasing agent of narcotics in France throughout the life of the conspiracy; Samnick and Danis, working through Aron, assisted the combine in smuggling narcotics into the country through New York; Bucelli handled the Boston branch of the smuggling operation; Brisbois distributed narcotics through Canada; and Gelb financed the group's activities and

handled the New York distribution. This was the opening phase of the conspiracy which, the Government maintains, was established by the testimony of Lafitte. Subsequent importing and distributing operations were part of the same continuing conspiracy enlarged to include additional members. Thus, after Gelb's arrest, Stromberg became the financier and Velluccì and Behrman became the chiefs of the distributing apparatus. The testimony of Ewing and Basile, it is argued, ties in the other defendants as links in the conspiratorial chain in the later period.

The appellants' main defense consists of an attack on the Government's assertion that a single and continuing conspiracy was proved. They point to the time gap, between December, 1952, when Lafitte's testimony ends, and December, 1953, when Ewing's begins. In this contention, they rely principally upon *United States* v. *Russano*, 2 Cir., 257 F. 2d 712.

It is true that many of the actors in the group described by Lafitte are not seen again after December 1952: Brisbois, Bucelli, Samnick and Danis do not reappear, and the evidence connecting Aron to the later period is slight. The links mainly relied upon by the Government are Baruche, Gelb and Behrman. We think Behrman's one reported appearance at Aron's office is hardly strong enough to tie him to the conspiracy before 1953; but Baruche and Gelb were both central participants in each phase, until Gelb's arrest in early 1954. In *United States* v. *Russano, supra*, there was some positive evidence that the first conspiracy had ceased between 1952 and 1953, when the second com-

menced. We find no parallel evidence here: Gelb and Baruche's activities, central to both phases, were exactly the same after the gap in testimony as before, and no intervening change was shown. See *United States* v. *Liss*, 2 Cir., 137 F. 2d 995, cert. denied 320 U. S. 773. A conspiracy, once established, is presumed to continue until the contrary is shown. *United States* v. *Cohen*, 2 Cir., 145 F. 2d 82, cert. denied 323 U. S. 799; *Hyde* v. *United States*, 225 U. S. 347; *Poliafico* v. *United States*, 6 Cir., 237 F. 2d 97, cert. denied 352 U. S. 1025; *Marino* v. *United States*, 9 Cir., 91 F. 2d 691. We hold there was sufficient evidence to go to the jury as to the existence of a single continuing conspiracy.

This conclusion is not invalidated by the absence of evidence to show that some of the "New York members" of the alleged conspiracy, including the Customs officers, knew of the existence of the "Boston members" or their operations in Boston or Canada, and vice versa. For this is not the case of a "circle conspiracy"[7] such as was involved in *Kotteakos* v. *United States*, 328 U. S. 750, or of a single transaction such as in *United States* v. *Peoni*, 2 Cir., 100 F. 2d 401. Here the evidence plainly supported a "chain" type conspiracy[7] such as was involved in *Blumenthal* v. *United States*, 332 U. S. 539, 556-7; *United States* v. *Bruno*, 2 Cir., 105 F. 2d 921, reversed on other grounds, 308 U. S. 287; *United States* v. *Cohen*, *supra*; *United States* v. *Rich*, 2 Cir., 262 F. 2d 415; *United States* v. *Carminati*, 2 Cir., 247 F. 2d 640, cert. denied 355 U. S. 883; *United States* v. *Tramaglino*, 2 Cir., 197 F. 2d 928, cert. denied 344 U. S. 864.

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[7] 57 Columbia Law Rev. 387, 390.

For here there was evidence of a core of conspirators (Aron, Baruche and Gelb)[8] who were buying, importing, and distributing narcotics for sale in large quantities in successive transactions. As the cases above cited show, from such evidence it might rationally be inferred that one joining such a conspiracy knew that it had a scope and that, for its successful operation, it required a widespread organization, more comprehensive than may have been disclosed by any contact or transaction of which he had knowledge through his actual personal participation. Thus activities by Boston conspirators in Boston were not outside the scope of the conspiratorial agreement merely because not shown to have been specifically known to certain of the New York conspirators, and vice versa. Each defendant, once found to be a member whatever the level of his participation may have been, might be found intentionally to have contributed to the success of the overall conspiracy.

The appellants also contend that the convictions should be reversed because obtained in "a mass trial" in which so many defendants were involved that, especially in view of the complex issues and the volume of evidence received "subject to connection,"[9] the jury could not properly evaluate and apply the evidence to the individual defendants. Here too we disagree. In so holding, we do not rest upon

[8] There was substantial evidence that after Gelb's arrest his functions in the conspiracy were taken over by Stromberg and Vellucci.

[9] Principally, evidence of the acts and declarations of alleged co-conspirators which according to the judge's ruling was not to be considered against a particular defendant unless he were found by independent evidence to be a member of the conspiracy.

the fact that the mere number of defendants on trial, or of alleged conspirators involved, was no greater than in other cases in which convictions have been affirmed, such as the *Bruno* and *Cohen* cases, cited above. *United States* v. *Falcone*, 2 Cir., 109 F. 2d 579, aff'd 311 U. S. 205. Nor do we think it determinative that no abuse of discretion was shown in denying below pretrial motions for severance. We place our holding squarely on the fact that, in the context of this trial, nothing in the issues, the evidence or the rulings warrants a conclusion that the number of the defendants prevented the jury from appraising the independent evidence against each defendant and meting out individual justice under the law.

Broadly viewed, the Government's case rested on the testimony of three witnesses, Lafitte, Ewing and Basile, whose credibility was vigorously assailed by the defendants. Surely it was not beyond the capacity of the jury to decide whether these witnesses were to be believed. And once it was determined that these witnesses were to be believed and that the acts and declarations of the defendants and their alleged coconspirators, to which these witnesses had testified, had indeed been made, we think it by no means a task of insuperable difficulty for the jury to comply with the judge's instructions[10] and determine as to each defendant the issue of membership in a single continuing conspiracy

[10] The judge charged:

"In your consideration, then, of the evidence you should first determine whether or not the conspiracy to import and distribute existed as charged in the indictment. If you conclude that such conspiracy did exist, you should next determine as to each defendant separately whether or not he or she was a party to or member of the conspiracy, with knowledge

on the basis of the independent evidence—i.e., the evidence as to his own acts and admissions.

There was nothing particularly complicated about the independent evidence which connected each defendant to the conspiracy. It's application involved the usual jury task of collating the separate items of independent evidence relating to each defendant and determining whether in sum

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of its illegal purpose and with the intention to assist the conspiracy to achieve its illegal objective.

"In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements or declarations of others. That is to say, you must determine the issue as to his or her membership in the conspiracy from his or her own statements or declarations or acts or conduct.

"If and when the existence of the conspiracy charged in the indictment and the membership or any or all of the defendants in such conspiracy has been found, then the acts done and the statements or declarations made by any person found by you to be a member of the conspiracy may be considered in connection with the case as to any defendant whom you find to have been a member of the conspiracy even though such acts and declarations may have been made in the absence and without the knowledge of such defendant, provided such acts were done and such statements or declarations were made during the continuance of such conspiracy and in furtherance of an objective or purpose of the conspiracy.

"So, if you conclude from the evidence that a defendant was a member of the conspiracy and you do so based upon the independent evidence, as I have already told you, based upon his own acts or her own acts or her declarations, or her or his conduct, you may then consider as if made by him or her any statements or declarations of other members of the conspiracy, even though they are not named as defendants in the indictment, provided such statements or declarations were made during the existence of the conspiracy and in furtherance of an object or purpose of the conspiracy as charged in the indictment."

total it warranted the inference of membership. To be sure, because of the number of the defendants and the exigencies of trial the several items of direct evidence relating to a particular defendant were interspersed throughout a record comprehensive enough to cover all. But even if it might have taxed the capacity of a jury single-handed, with memory of the evidence unrefreshed, to filter out and collate the several items of evidence relating to the connection of each defendant, this jury had the aid of a summary of such evidence given by the judge in his charge. Notwithstanding the number of defendants, we are confident that aided by the judge's charge the jury had in mind the evidence unconditionally received against each defendant which linked him with the conspiracy.

It is true, that in addition to the independent evidence of the acts and declarations of the individual defendants, there were before the jury, subject to connection, numerous incriminating hearsay declarations of coconspirators which under the judge's charge were competent only against such defendants as were found by the jury to be linked to the conspiracy by independent evidence and only if made in the furtherance of the conspiracy. The appellants contend that with so many defendants on trial the jury could not keep these two categories separate. But as Judge Hand pointed out in *United States* v. *Dennis*, 183 F. 2d 201, 230, 231, aff'd on other grounds 341 U. S. 494, it was, at least under the preferred doctrine, a preliminary question for the judge to decide as to each defendant whether, if the Government's witnesses were believed, he and the various declarants were engaged in a common conspiracy which the declarations helped to realize; it was for the jury on all the evidence "to decide whether they believed the wit-

nesses beyond a reasonable doubt." In this view of the law, if the judge, taking the testimony of the Government witnesses as true, decides that a given declarant and a given defendant were engaged in a common conspiracy, which the declarations helped to realize, the declarations of the co-conspirators are left "to the jury to use like any other evidence * * *" And there is no need for the jury "to keep their minds in isolated compartments" as would be the case if the preliminary question were left to the jury. See also *Glasser* v. *United States*, 315 U. S. 60, 74; *United States* v. *Pugliese*, 2 Cir., 153 F. 2d 497; *United States* v. *Compagna*, 146 F. 2d 524, cert. denied 324 U. S. 867. Accordingly, once the judge by his denial of motions for judgments of acquittal made at the close of the Government's case had himself decided the preliminary question as to whether the declarations of coconspirators in the execution of the conspiracy had been connected under the rule of the *Dennis* and *Pugliese* cases, there was no need for the jury to keep the evidence of declarations conditionally received in "isolated compartments" of their minds.

Here, as Judge Hand suggested in his opinion in the *Dennis* case, the charge was overly favorable to the defendants. For the judge, by denying the motions for acquittal, himself decided as to each defendant the preliminary question of connection to the conspiracy by independent evidence.[10a] Yet he instructed the jury that only if it also de-

[10a] That the judge properly exercised his function in this respect is demonstrated by the judgment of acquittal of the defendant Lewis granted at the close of the Government's case. The judgment was granted on the express ground that there was insufficient independent evidence to connect Lewis with the conspiracy.

cided the preliminary question adversely to a defendant could it proceed to consideration of the ultimate issue of his guilt beyond a reasonable doubt on all the evidence. The error, since in favor of the defendants, is of course not ground for reversal.

Moreover, we must not lose sight of the fact that the difficulties which the appellants envisage stem from the number of conspirators rather than the number of defendants on trial. The same evidence would have been admissible similarly subject to connection and the same problems would have arisen if each of the appellants had been tried separately. In the one situation as in the other, the number of conspirators would have been the same. *United States* v. *Carminati*, *supra*. And of course conspirators are not entitled to immunity merely because their number is great. *United States* v. *Cohen*, *supra*; *Kotteakos* v. *United States*, *supra*. Indeed, broadly considered the large conspiracies are potentially more dangerous than the small ones.

The foregoing holdings, however, do not finally dispose of the objections of a number of the individual defendants that the evidence was insufficient to support a finding that each was a member of the conspiracy. Most of these objections are directed at the credibility of the principal Government witnesses. In so far as this is the case, they will be disregarded, for of course it is not the function of an appellate court to redetermine controverted issues already decided by the jury. *Cramer* v. *United States*, 325 U. S. 1; *United States* v. *Markman*, 2 Cir., 193 2d 574; *United States* v. *Campagna*, *supra*; *United States* v. *Manton*, 2 Cir., 107 F. 2d 834, cert. denied 309 U. S. 664. But it is

incumbent upon us to examine contentions that even if the Government witnesses are believed the independent evidence connecting each defendant with the conspiracy is insufficient to sustain his conviction. *Glasser* v. *United States*, *supra*.

As to the appellants Samnick and Danis, we are unable to find evidence which warranted submission to the jury. Much of the evidence relating to them was hearsay: Lafitte testified that Aron described each as one of his Customs men, but not in their presence; a check, drawn by Aron payable to cash was said by him to be for Samnick, again not in his presence. Each, to be sure, was frequently in Aron's office and was frequently entertained; and Samnick, upon at least one occasion, was called to expedite the entry of resistors for Aron's apparently legitimate importation business. But mere association with conspirators is insufficient basis for a finding of participation. *Di Re* v. *United States*, 332 U. S. 581; *Aikens* v. *United States*, D. C. Cir., 231 F. 2d 66; *United States* v. *Moloney*, 7 Cir., 200 F. 2d 344. The only proof which could possibly be considered independent evidence of participation consists of the statements, one by each of these two defendants, made to Lafitte.[11]. As to one of these statements, it is not clear that the subject-matter was narcotics rather than resistors. And each might not unreasonably be construed only as hypothetical comment: after all, there was no evidence

[11] In response to Lafitte's statement that big packages of narcotics were difficult to get through Customers, Samnick is reported to have said, "By boat or by plane the best way to do it is to use two big suitcases." Danis, upon another occasion, is reported to have said that "if he wanted, he can go with a truck across."

whatever that either Sammick or Danis had ever actually used the smuggling technique which they mentioned. It may seem strange that narcotics conspirators should discuss such techniques at luncheon with friends not members of the conspiracy. But no inference unfavorable to these defendants may be drawn from this fact: Lafitte's own testimony shows that they discussed their nefarious business with him knowing that he was not a coconspirator. As to these two defendants, the independent evidence was too slight to warrant the admission of hearsay declarations and too slight to submit to the jury. Their motions for a directed verdict should have been granted.

We also think that the conviction of the appellant Snyder must be reversed. At the trial, it was stipulated that Snyder had been introduced to either Aron or Barache in 1949, before the conspiracy began. Aside from this, which standing alone was insufficient to support a conviction, the only incident connecting Snyder with the conspiracy is the delivery of two suitcases, later found to contain heroin, to Vellucci and Ewin in Hoboken.[12] In *United States* v. *Bruna*, 2 Cir., 242 F. 2d 302, cert. denied *sub nom. Maccio* v. *United States*, 354 U. S. 913, we held that participation in a single isolated transaction was an insufficient basis upon which to bottom an inference of continuing participation in a conspiracy. For aught that appears in this record, this was Snyder's only transaction with the group: under

[12] Snyder's conviction rests upon the jury's acceptance of Ewing's identification of him and upon the jury's rejection of Snyder's very plausible alibi. But these are questions of fact, which, we have held, are not reviewable here. On the identification point, see *Zamiar* v. *United States*, 8 Cir., 217 F. 2d 223.

the reasoning of the *Reina* case, the evidence is insufficient to support the inference that Snyder knew or accepted the conspiratorial aims or that his participation went beyond the single transaction.

The apppellants De Saverio and Seto also invoke the *Reina* decision. But the evidence against both of these appellants was not limited to a single transaction. As to De Saverio, Ewing testified to a conversation between DeSaverio and Vellucci about the amount of money, $12,000, owed to Vellucci "for the balance of a kilo and part on a kilo that he had not paid for." Taking the conversation in context, we think that, in the light of the evidence of the amount of narcotics involved and the manner of payment, a jury might reasonably infer the two were discussing payment for more than a single sale and that both understood that the narcotics involved were bought for distribution at retail. Moreover, upon another occasion Ewing was present when De Saverio paid Vellucci money. This aspect of the case was fairly put to the jury by the trial judge's charge. And to Seto also, we think, the *Reina* decision is inapplicable. For Ewing testified to an order by Seto from Vellucci in the summer of 1954 and to a second order in May, 1955. And he described these as two of half a dozen transactions in all.

De Saverio also insists that it was error for the judge to refuse a charge as to evidence relating to his attempted impeachment of Ewing's testimony against him. Ewing had testified that the transactions between Vellucci and De Saverio took place in De Saverio's club in 1954 and on cross-examination he had described the layout and furnish-

ings of the club where the business between Vellucci and De Saverio was carried on. The defense called two former members of the club who testified to changes in the layout and furnishings made, they said, in the spring of 1955 and described the premises before and after the changes. Ewing's description, which purported to be that of the premises as existing in 1954, more nearly resembled, according to testimony of the defense witnesses, the premises as they were after the changes. To explain this apparent conflict the prosecutor on summation suggested that the conversations which implicated De Saverio might have occurred on a visit to the club in 1955 after the changes had been made, pointing out that there was no evidence that Ewing had not been there in 1955. To this the defense objected and, to bolster its attempt to impeach Ewing's testimony, De Saverio's counsel at the close of the Government's summations requested a charge that there was no evidence that Ewing had been in the club in 1955. It is the refusal so to charge that is now assigned as error. We think the claim of error is without substance. When the prosecutor's summation was interrupted by the objection, the judge said: "I don't think there was any evidence that they [Ewing and Vellucci] continued to go there [to De Saverio's club] in 1955." In his summary of the Government's case against De Saverio he called attention to Ewing's testimony that the visit to the club was in *1954*[13] and to the conflict between Ewing's testimony as to the visit

[13] Ewing placed the visit to De Saverio's club a week after his first meeting him in another bar. When asked as to the time of the first meeting, Ewing said: "I believe it was the summer of '53—'54." When pressed more closely he said: "The summer of 1954."

in 1954 and his description of the club as it then existed, on the one hand, and the testimony of the defense witnesses, on the other. He instructed the jury that they must acquit De Saverio if they did not believe Ewing's testimony. And he instructed generally that it was for the jury to determine what the testimony was, not from the assertions of counsel but from their own recollection. We think that the defendant's rights were sufficiently guarded and that the issue was properly submitted to the jury without the requested charge as to the absence of evidence of any post-1954 visit. See *United States* v. *Rosenberg,* 2 Cir., 195 F. 2d 583, 597-598, cert. denied 344 U. S. 838.

The appellant Teitelbaum also objects that there was insufficient evidence to connect him with the conspiracy. Ewing testified that Teitelbaum was always present, with Stromberg, when Vellucci and Behrman met Stromberg for the purpose of discussing the financing of narcotics shipments. However, several of these conversations neither Teitelbaum nor Ewing were able to hear, since they remained at the bar while the others discussed business around a table some distance away. Nevertheless, Teitelbaum was present, although not a participant, during at least two other conversations dealing with narcotics. From these, the jury might fairly believe that Teitelbaum knew of the common plan. And there was testimony that he delivered a payment from Vellucci to Stromberg upon one occasion and that at the same time he discussed the purposes of the conspiracy with Vellucci. As to Teitelbaum, we hold that the jury's conclusion was warranted.

Other appellants also contend that the evidence was insufficient to support their convictions. Except as to Samnick, Danis and Snyder, we overrule this claim of error. We have reviewed the evidence against each and conclude that the sufficiency of the Government's proof was so plain that further comment on this claim of error will serve no useful purpose. We turn therefore, to consider claims of specific error.

The appellant Behrman and several others ascribe prejudicial error based upon Ewing's response to a question upon cross-examination. Ewing was being questioned as to his failure to mention Behrman's name in his testimony before the grand jury. The cross-examiner was pressing for a direct answer; the witness replied that he was unable to give one without an explanation. The judge ruled that he might answer and then explain. The witness then said: "No, I didn't mention his name in there because at that time I was not dealing with Nathan Behrman. *At that time Nathan was in jail.*"

There can be no doubt that the testimony above italicized was inadmissible; and to Behrman at least, it was also prejudicial. However, the answer was unforeseeable: plainly it had not been induced by the prosecution. The judge immediately struck out the testimony and instructed the jury to disregard it, adding "You are to pay no attention to that remark in any way. You are to disregard it completely." And the incident was an isolated one during the course of a long trial. These considerations distinguish the case from *United States* v. *Tomaiolo*, 2 Cir., 249 F. 2d 683, at page 695, where reversal was based on an

accumulation of errors. We are of the opinion that in the setting of this case the prompt instruction to disregard the answer cured the error. *United States* v. *Giallo*, 2 Cir., 206 F. 2d 207, aff'd 346 U. S. 929; *United States* v. *Curzio*, 3 Cir., 179 F. 2d 380; see *United States* v. *Apuzzo*, 2 Cir., 245 F. 2d 416, cert. denied 355 U. S. 831.

As is not unusual in an appeal from a fiercely contested and important trial, numerous claims of error are based on the conduct of the prosecutor. First, we will consider the prejudice claimed to have resulted from a public speech made[14] by the United States Attorney after the trial had begun in which he expatiated on the menace of organized crime. The speech was reported in at least two newspapers; in the New York Herald Tribune, it occupied a prominent place on the editorial page. As reported, the speech dealt with two major crime syndicates operating in New York and Chicago, alleged to have millions of dollars at their disposal to encourage activities in "gambling, racketeering and other illicit traffic • • • "; it was suggested that the Mafia was the connecting link between the syndicates and that one of the objects for which their financial power was used was "to influence and buy elected public officials and law-enforcement agents." Later in the article, the Federal Bureau of Narcotics was mentioned among the federal enforcement agencies which constituted an "important element in this campaign against organized crime." No reference was made to this case or to any of the defendants.

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[14] The speech was made on a prior invitation to address the alumni of a large law school.

We think it unfortunate and undesirable for the prosecutor to make such a speech while conducting an important criminal trial. The effect may be so to stimulate outside pressures on the jury, through press and radio publicity, that a defendant's right to a fair trial may be impaired. Such pressures, even when not induced by the prosecutor, have sometimes been held to constitute sufficient ground for a new trial. See *Delaney* v. *United States*, 1 Cir., 199 F. 2d 107. But the problem here is not to state the preferred rule of practice, but rather with the aid of hindsight to assess the effect of the act upon this particular jury. See *Delaney* v. *United States, supra; United States* v. *Allied Stevedoring Corp.*, 2 Cir., 241 F. 2d 925, cert. denied 353 U. S. 984. In this case, the trial judge, after determining that several of the jurors had seen the article, immediately admonished them to disregard it and not to discuss it with anyone so that "the trial does not become adulterated by anything outside which may affect the jury." Doubts have been expressed about the effectiveness of such judicial admonitions. See *United States* v. *Leviton*, 2 Cir., 193 F. 2d 848, 865-867; *United States* v. *Keegan*, 2 Cir., 141 F. 2d 248, reversed on other grounds 325 U. S. 478; *Delaney* v. *United States, supra.* However, the content of this article differed little from much contemporary writing in the press on the general subject of organized crime and law enforcement. Its tendency to create prejudice against any of the defendants then on trial was neither direct nor strong, *United States* v. *Allied Stevedoring Corp., supra.* Only the fact that this speech was made by the prosecutor gives any color at all to the claim of prejudice now raised. Because

the article contained comment about the bribery of law-enforcement agents, it may have had a more direct thrust against the Customs officers on trial below than against the other appellants. And for other reasons set forth above, we have held that the verdicts against them cannot stand. As to the other appellants, we conclude that the possibility of resulting prejudice, especially in view of the judge's admonition, was too remote to affect the fairness of the trial or the validity of the convictions. *United States* v. *Allied Stevedoring Corp., supra.* In *United States* v. *Postma,* 2 Cir., 242 F. 2d 488, cert. denied 354 U. S. 922, convictions were affirmed in spite of contemporary newspaper publicity distinctly more damaging to the defendants than the article involved in this case.

Many other complaints are made about the conduct of the United States Attorney during the course of the trial. Most of these relate to his summation. The appellants, relying upon *Berger* v. *United States,* 295 U. S. 78, and *United States* v. *Spangelet,* 2 Cir., 258 F. 2d 338, assert that the United States Attorney placed his own integrity in the scales to support the credibility of his witnesses and that he improperly stated that he would never engage in any unfair tactics. It is true that in *United States* v. *Spangelet, supra,* we reversed where the prosecutor supported the credibility of a government witness by the statement that he had never made a deal. This summation, however, is in a radically different posture, because of the charges made by defense counsel in their summation. These charges need not be detailed at length: there were statements that two Government employees had "framed"

the defendants; that the United States Attorney had no choice but to prosecute the defendants; and that he himself did not believe the prosecution witnesses. In replying to these charges, the United States Attorney was well within his rights. See *Lawn* v. *United States*, 355 U. S. 339, 359 n. 15, affirming *United States* v. *Giglio*, 2 Cir., 232 F. 2d 589; *Henderson* v. *United States*, 6 Cir., 218 F. 2d 14; *Malone* v. *United States*, 7 Cir., 94 F. 2d 281, cert. denied 304 U. S. 562.

However, one comment in the Government's summation we must hold to constitute error. In discussing the corroboration of the Government's witnesses, the United States Attorney remarked: "Even Brisbois, who had the courage to take the stand • • • " Objections were immediately and properly taken. The comment was improper because it indirectly called attention to the failure of other defendants to take the stand: it was tantamount to saying that certain of the defendants lacked the courage to take the stand. *Wilson* v. *United States*, 149 U. S. 60; *Rice* v. *United States*, 2 Cir., 35 F. 2d 689, cert. denied 281 U. S. 730; *Morrison* v. *United States*, 8 Cir., 6 F. 2d 809. Nevertheless, in the context of this long trial, we think the incident not so prejudicial as to require a new trial. Several of the defendants' counsel had already commented upon their clients' failure to take the stand and had informed the jury that no adverse inference was to be drawn therefrom. Furthermore, Brisbois' counsel had emphasized that his client had taken the stand. The damaging fact had therefore already been put before the jury by the defense. Cf. *United States* v. *Feinberg*, 2 Cir., 140 F. 2d 592, 595. Moreover, a clear instruction to the jury was included in

the judge's charge. This, we have held, may cure such error. *United States* v. *DeVasto*, 2 Cir., 52 F. 2d 26, cert. denied 284 U. S. 678; *United States* v. *Di Carlo*, 2 Cir., 64 F. 2d 15; see *Wilson* v. *United States*, *supra*.

We hold also that reversible error is not to be found in the prosecutor's remark, after Ewing was asked his address, "Don't be afraid to give it to us." The judge immediately reproved the prosecutor and admonished the jury that the remark was to be disregarded. *United States* v. *Achilli*, 7 Cir., 234 F. 2d 797, aff'd 353 U. S. 373. Indeed, we doubt that the jury would have perceived any prejudicial connotation in the remark were it not for the objections it evoked. And, lastly, the prosecutor's remark, upon summation, that Ewing was living under guard in a Brooklyn hotel was a fair response, we hold, to the defense contention that he was living off the fat of the land. That the remark carried a possible implication that the guard was for Ewing's protection may not have been perceived by the jury until raised by the defense. For it was known to the jury that Ewing was a convicted criminal awaiting sentence. Upon objection, however, the judge again gave the jury an appropriate admonition.

To support their attack on the conduct of the prosecutor, counsel cites *Handford* v. *United States*, 359 U. S. 120, in which the decision reported in 260 F. 2d 890 was reversed in a brief *Per Curiam* "[u]pon consideration of the entire record and the confession of error by the Solicitor General." Counsel have made available to us the Solicitor General's memorandum in response to Handford's petition for certiorari from which it appears that in the *Handford*

trial the prosecutor, in his summation, had wholly without warrant made a prejudicial reference to the defendant's financial affluence. There was no comparable comment made in the case at bar. The appellants complain of the following observation of the prosecutor: "I am not going to deal in generalities; I haven't got time. I have been allowed five hours to answer 15 hours of the most subtle argument, cleverly distorted pictures of parts of the case, by the most able criminal lawyers practicing before any bar of justice." We fail to understand how this passage, which merely returned the compliment which the defendants had paid to the skill of the prosecutor, can be thought to deserve the censure implicit in the *Handford Per Curiam*. This and the other passages which the appellants criticize we think constituted no more than fair and vigorous advocacy: it was argument called for in response to arguments made in the summations for the appellants.

We proceed now to a consideration of various miscellaneous claims of error. Relying upon a statement in *United States* v. *Aron*, 2 Cir., 239 F. 2d 857, appellants contend that the statements made by Aron to Lafitte were extrajudicial admissions, for which corroboration is required. *Opper* v. *United States*, 348 U. S. 84. We find that Lafitte's testimony below was corroborated in many particulars—the story of the Boston trip, for example, was supported by the testimony of Taylor. But we need not rest upon this to overrule this claim of error. For it is clear that in the context of this case of Aron's declarations cannot properly be classified as extrajudicial admissions. They were made during the life of the conspiracy and were not therefore admissions after the fact. See *Smith* v. *United*

States, 348 U. S. 147, 155; *Warszower* v. *United States*, 312 U. S. 342. They were in furtherance of the conspiracy, since, as Lafitte testified, Gelb, Baruche and Aron were seeking his participation. And they were not subject to those weaknesses which characterize admissions or confessions made under pressure of police investigation. *Smith* v. *United States*, *supra*; *United States* v. *Winston*, 7 Cir., 222 F. 2d 323. In short, they were not admissions for which corroboration is legally required.

The appellant Mirra contends that "in a mass trial such as here," he was entitled as of right to a charge that the Government's evidence against him through the testimony of Basile, a coconspirator, was uncorroborated; a charge explaining what uncorroborated testimony is; and a charge that uncorroborated testimony of an accomplice should be scrutinized with great caution. He cites no cases which support these contentions. The applicable law does not require the corroboration of accomplice testimony. *Caminetti* v. *United States*, 242 U. S. 470, 495; *United States* v. *Moran*, 2 Cir., 151 F. 2d 661, 167 A. L. R. 403; *United States* v. *Schwartz*, 2 Cir., 150 F. 2d 627, cert. denied 326 U. S. 757; *United States* v. *Quinn*, 2 Cir., 124 F. 2d 378; *United States* v. *Gallo*, 2 Cir., 123 F. 2d 229. Nor would omission of a charge about the necessary caution with which a jury should approach accomplice testimony necessarily constitute reversible error, although it is the better practice to give it. *Caminetti* v. *United States*, *supra*; *United States* v. *Wilson*, 2 Cir., 154 F. 2d 802, vacated for resentencing 328 U. S. 823; *Pittsburgh Plate Glass Co.* v. *United States*, 4 Cir., 260 F. 2d 397, cert. limited to another

question 358 U. S. 917; *United States* v. *Bucur*, 7 Cir., 194 F. 2d 297. Here, it is true that the Government's whole case against Mirra rested on the uncorroborated testimony of Basile, a coconspirator. But in his charge the judge pointed out that counsel for Mirra contended that Basile's testimony had been discredited and that there was some evidence of friction between Basile and Mirra. He charged explicitly that "if you do not believe the testimony of Basile concerning the defendant Mirra, then you must find Mirra not guilty." This was followed by comprehensive and lucid general instructions as to the tests of credibility. We find no error in Mirra's conviction.

The appellants also complain that they were denied access to a report to which they claim to have been entitled under the rule of *Jencks* v. *United States*, 353 U. S. 657. The "report" in question was a summary by a Government narcotics agent of interviews with the Government witness, Ewing, prepared partly from recollection and partly from contemporary jottings over a period of about eight months. The report was in the agent's language, not Ewing's, and it had never been shown to, or adopted by, Ewing. When these facts had been developed in a hearing, the judge after seeing the report sustained the Government's refusal to disclose this report to the defense[15] upon the ground that it was not "substantially verbatim" nor "recorded contemporaneously" and hence not within the purview of 18 U. S. C. A. §3500. The ruling was plainly right. The

[15] After Ewing's direct examination, the Government delivered to the defense 260 pages of his contemporaneously recorded and substantially verbatim statements as well as his grand jury testimony.

appellants, however, contend that to the extent that §3500 restricts the right of inspection under the *Jencks* rule it is unconstitutional. As to this, unless and until the Supreme Court rules otherwise we shall adhere to the position which we took in *United States* v. *Spangelet, supra; United States* v. *Palermo,* 2 Cir., 258 F. 2d 397, cert. granted 358 U. S. 905; and *United States* v. *Lev,* 2 Cir., 258 F. 2d 9, cert. granted 358 U. S. 903. We hold that the enactment of §3500 was a valid exercise of Congressional power.

It is also urged that the trial judge unduly limited the cross-examination of certain witnesses. The claimed errors relating to the cross-examination of Lafitte may be quickly disposed of. The first of these relates to the trial judge's refusal to allow inquiry as to Lafitte's address. See *Alford* v. *United States,* 282 U. S. 687. However, somewhat later he instructed the United States Attorney to turn the address over to the defendants, whereupon defense counsel specifically withdrew their request. Moreover, the cross-examination directed to Lafitte's background was so complete and searching that we think it would have been proper for the trial judge to decide that the subject of his credibility had been thoroughly explored and to call a halt to this aspect of the cross-examination. *Alford* v. *United States, supra,* at page 694; McCormick, Evidence (1954 ed.), page 56. The same rule is dispositive of the objections to certain matters relating to Ewing's testimony. Ewing had been convicted, by court martial, of desertion and of sodomy. The records of these convictions were introduced during his cross-examination. Upon Ewing's denial that he committed the homosexual act and his assertion that he could not re-

member whether any witnesses had testified against him, the defense sought to introduce the transcript of the court-martial proceedings. This it was not permitted to do. The evidence was asserted to be relevant to impeach credibility. But the particular matter involved went far beyond establishing a criminal conviction. It was a collateral matter, and we think the trial judge wisely exercised his discretion in excluding it. *United States* v. *Tomaiolo, supra*; *United States* v. *Miller*, 2 Cir., 246 F. 2d 486, cert. denied 355 U. S. 905. The cross-examination of Ewing which lasted for seven days was mostly devoted to attempted impeachment. Plain common sense precludes a holding that the inquiry was unduly restricted.

We have considered all other questions raised by the appellants and conclude that they lack sufficient merit to warrant further discussion.

The court extends its thanks to Messrs. Boyden, Delaney, and Polakoff for their exceedingly able representation of the appellants De Saverio, Aron and Seto as assigned counsel in this long and involved appeal.

For reasons already stated, the convictions of Samnick, Danis and Snyder are reversed and remanded with directions to dismiss. *Yates* v. *United States*, 354 U. S. 298; *Bryan* v. *United States*, 338 U. S. 552; *United States* v. *Silverman*, 2 Cir., 248 F. 2d 671, cert. denied 355 U. S. 942. The convictions of all the other appellants are affirmed.